Before The
Federal Communications Commission
Washington D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 93-25
	)	
Direct Broadcast Satellite Public Service Obligations	)	

To: The Commission

COMMENTS

Hispanic Information and Telecommunications Network, Inc., ("HITN"), by its counsel, hereby submits its Comments with respect to the above-referenced proceeding.[1] Specifically, HITN submits its comments with respect to that portion of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 which relates to carriage obligations for non-commercial, educational and informational programming. *Inter alia*, HITN urges that the definition of "National Educational Programming Supplier" be extended to include those entities who conform with the eligibility criteria established by the rules for the Instructional Television Fixed Service ("ITFS"). These criteria conform with both the plain meaning and the statutory construction of the language used by Congress in Section 25 of the Cable Television Consumer Protection and Competition Act of 1992. In support whereof, the following is submitted.

[1] Comments were required to be filed by May 24, 1993. See *Notice of Proposed Rulemaking*, 8 FCC Rcd 1589 (1993). Consequently, the HITN Comments are timely filed.

Background

On September 14, 1992, the Congress passed the Cable Television Consumer Protection and Competition Act of 1992 ("The Cable Act"). The Cable Act encompassed many areas of the cable regulation. Section 25 of the Cable Act amended the Communications Act of 1934, as amended, to add Section 335, entitled "Direct Broadcast Satellite Service Obligations." The key provisions of this new Section 335 as they affect the instant proceeding stated that the Commission must require as a condition of any authorization for a provider of direct broadcast satellite ("DBS") service that it reserve a portion of its channel capacity, from 4 to 7 percent, exclusively for noncommercial programming of an educational or informational nature. Furthermore, a provider of DBS service must make channel

HITN is unquestionably qualified to participate in the DBS channel set-aside for noncommercial programmers established by Congress in Section 335. Consequently, it propose that the Commission adopt the following principles in its rules governing the set-aside channels for the equitable and orderly administration of access to, and utilization of, those channels.

Fundamental Principle

Prior to making specific suggestions, HITN would urge that the Commission use a general principle of fairness to guide its decision with respect to the specific rules adopted for the DBS channel set-aside for noncommercial programmers. It is clear from the positions proposed in the NPRM that the FCC is committed to protecting the DBS providers as much as possible, while conceding as little as possible to the noncommercial programmers under the new Section 335. This violates the spirit of the new law, and will violate the letter if the Commission adopts rules which are overly restrictive and do not provide noncommercial programmers meaningful access to the DBS service as intended by Congress. The Commission should provide as much access to the DBS service for noncommercial programmers as possible, rather than protecting the commercial interests involved in this proceeding.

As recent study after recent study has shown, there is an educational crisis in America. American students lag behind students from other countries in many important areas. The educational crisis among minorities, including Hispanics, is

even more pronounced. Recognizing the extent of this crisis, it is a stated goal of the Clinton administration to raise the level of quality of education in this country in order to eliminate this problem. It is a goal of the new Administration that this country educate its citizens so that it ensures its competitive place in the global economy with workers educated and trained to meet the demands of the 21st century. The fact that Congress has established a DBS channel set-aside for educational programming is an historic opportunity for the FCC to ensure that the necessary educational programming is made available to *every citizen* in this country.

[redacted]

DBS set-aside channels as mandated by Congress. The FCC specifically mentions ITFS entities in Paragraph 43, footnote 47 of the NPRM, posing the question whether the eligibility criteria for ITFS have any relevance here. HITN urges that the answer is self-evident. ITFS entities qualify under any interpretation of the definition.

HITN suggests that there are two methods to determine the eligibility of entities to use this proposed service: plain meaning of the statute and statutory construction of the language used by Congress in the legislation.

1. Plain Meaning

As defined in the legislation itself, the term "national educational programming supplier":

> "includes any qualified noncommercial educational television station, other public telecommunications entities, and public or private educational institutions."

See Paragraph 43 of NPRM.

HITN qualifies in several respects under the plain meaning test. It is a "noncommercial educational television station" in each of the 29 cities where it has applied for and received FCC license to operate ITFS stations. ITFS is not strictly a broadcast service, but the definition herein does not specifically refer to broadcast stations. HITN must also be considered a public telecommunications entity. The term public here means that the entity has received public funds from federal, state, or local sources in order to operate. HITN

receives a majority of its funding from the state of New York, where it is organized and chartered. As a Commission licensee, HITN's credentials as an educational organization are now a matter of long-standing public record with the Commission.

2. Statutory Construction

Section 74.932(a) defines the eligibility requirements for an ITFS licensee. The section states that:

> "a license for an instructional television fixed station will be issued only to an accredited institution or to a governmental organization engaged in the formal education of enrolled students or to a nonprofit organization whose purposes are educational and include providing educational and instructional television material to such accredited institutions and governmental organizations, and which is otherwise qualified under the statutory provision of the Communications Act of 1934 as amended.

The Commission asks in Paragraph 43 to what extent it should incorporate Section 397 of the Act? The statutory construction of the meaning of the term "national educational programming supplier"

mandates that the FCC must rely specifically on Section 397 of

[redacted]

"public telecommunications entities" as

> "any enterprise which (A) is a public broadcast station or a noncommercial telecommunications entity; and (B) disseminates public telecommunications services to the public."

Section 397 (7) defines the term "noncommercial telecommunications entity" as:

> any enterprise which (A) is owned and operated by a State, a political or special purpose subdivision of a State, a public agency, *or a nonprofit private foundation, corporation, or association*; and (B) has been organized primarily for the purpose of disseminating audio or video noncommercial educational and cultural programs to the public by means other than a primary television or radio broadcast station..."

Congress makes specific reference to the language used in Section 397 of the Act. HITN specifically falls under the definition used by Congress in Section 25. HITN falls under the definition of a public telecommunications entity since it is a noncommercial telecommunications entity which disseminates public telecommunications services to the public. (Section 397(14) defines "public telecommunications services" as noncommercial educational and cultural radio and television

the language in Section 397.

The FCC states that:

> "We are of the view that this term would encompass not only public television licensees but also entities such as the Public Broadcasting Service which disseminates programming on a national basis to public television stations." See Paragraph 43.

If you accept the premise that PBS is qualified under the new law, then HITN must also be qualified. There is no theoretical difference between PBS and HITN under the definitions contained in Section 397. PBS operates on a much larger scale, but performs the same function as HITN, i.e., proving educational and informational programming to its various outlets around the country for distribution. There is one special difference between the two entities, though; HITN is a Commission licensee [redacted]

educational programming suppliers would seem to render any further extension of the definition beyond a local entity to be moot. The only permissible extension would flow from the term "qualified".

To qualify as a "national" programming supplier, HITN would urge that an entity would have to demonstrate that it is authorized by the FCC, or through some other legal means such as a contractual obligation, to provide programming to viewers in different areas of the country. It strains logic to consider a local television station to be "national" program supplier, if all it does is broadcast programming to viewers in its coverage area. On the other hand, if the local station distributes its programming for use on stations around the country, then it may qualify as a "national" programmer. In other words, the term "qualified" in the statute allows the FCC to stretch the definition to apply to entities such as HITN, who are authorized to serve markets all across the country.

No Basic Eligibility Requirement or Preference for Corporate Connection

The Commission queries in Paragraph 43 of the NPRM whether:

> "to qualify for capacity under the reservation provision, or to satisfy a DBS service provider's obligations under this provision, should we take into consideration any corporate relationship between the DBS provider and the program supplier?"

The Commission is overly vague in this regard, and HITN must conclude that, since the Commission's usual practice is to

address an issue with crystal clarity, such language is intentionally so. This is poor administrative practice, especially if the FCC has a clear purpose in mind by permitting some type of corporate relationship to somehow play a role regarding eligibility in this new area. However, as a general principle, a corporate relationship, much like the multiple ownership or duopoly rules, should work *against* a program supplier, not redound to their benefit. If this amorphous "corporate relationship" referred to in the NPRM is meant to be either the Corporation for Public Broadcasting, or any entity receiving funding from same, then there should be no preference

what a channel is at all.[2] However, the Commission does note in Paragraph 13 that:

> "With the advent of digital compression technology and the ability to transmit several video programs using a single transponder, we must determine whether 'channel' should refer to a whole transponder or a single one of the program services contained in a compressed signal."

The Commission should use the most expansive definition possible, rather than sticking to the 24 MHz definition for Part 100 licensee and the 30-36 MHz definition for Part 25 providers. This is particularly true if the DBS provider indicates that it intends to use compression technology to increase the number of programming services carried by the system prior to launch.

Concomitantly, channel capacity means the maximum number of channels available to the DBS provider for the carriage of programming by the system. The Commission queries:

> "Should we count the number of channels licensed or allotted to a DBS distributor? Or, should we count the number of channels supplied to customers?" See Paragraph 39.

The equitable solution is to use both methods, whichever produces the larger number of channels. To fail to do so will result in DBS providers using the Commission's standards to provide the least amount of channels possible and to avoid its public interest obligations to provide as much educational programming to the public as possible. For instance, using the

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[2] The Commission indicates that "it is customary for a fixed-satellite operator to use approximately 30 to 36 MHz of spectrum to provide a video signal of comparable quality to that of a Part 100 channel." See Paragraph 13.

former standard, the DBS operator could be licensed on ten channels and actually provide service on forty based on the [redacted]

reservation requirement should increase over time as industry develops. See Paragraph 40. As just discussed, this question can be answered in the negative, since the maximum percentage should be instituted at the inception of the service.

Grandfathered Provisions

The Commission asks whether DBS providers currently providing service pursuant to executed contracts should have all existing services grandfathered, and whether such programming services should be subject to reservation requirements. See Paragraph 40. There should be no grandfathering of any programming service. The total channel capacity should mean just that, and include the entire amount of channels in the DBS' provider system. The noncommercial programmers are not getting the use of the set-aside channels for free. They are paying what will

Use of Unused Channel Capacity

The Commission need not regulate the area of channel usage which was discussed in Paragraph 45 with more than a minimum of requirements. The terms of the DBS provider vacating an unused channel can be easily incorporated into the lease agreement entered into between the DBS provider and the noncommercial programmer. If the DBS provider is using the channel contemplated by the noncommercial programmer prior to the time the parties enter into a lease agreement for the channels, the parties can negotiate the time limit for the DBS provider to vacate the channel as well as the other terms of the lease. There should be recourse to the Commission should the DBS provider unreasonably refuse to allow access to the noncommercial programmers' percentage of the set-aside channels. The least restrictive rule would be for the Commission to mandate that, regardless of the terms of a lease, the DBS provider would have to abandon the channel no later than 30 days after the start date of the lease, or be subject to forfeiture proceedings before the Commission.

Rates

Given the nature of the noncommercial entities seeking the

to those costs of transmitting the signal to the uplink facility and the direct cost of uplinking the signal to the satellite. No indirect costs of any kind should be permitted to be included in the determination of the rates by the DBS provider.

This is clearly the intent of the legislation, which requires the Commission to take into account the non-profit nature of the noncommercial programmer. In addition the legislation also forbids the Commission to allow the inclusion of any overhead costs in the calculation of "direct cost." See Section 335(b)(4)(B). Consequently, the Commission's attempt in the NPRM to expand the definition to include other overhead costs completely contradicts the statutory mandate and must be rejected.[5]

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[5] The Commission states that:
"The legislative history of the Cable Act states that direct costs should include only the costs of transmitting the signal to the uplink facility and the direct costs of uplinking the signal to the satellite and not any indirect costs such as marketing, general administrative or overhead. Costs such as a proportional share of construction launch and insurance of the space station used are not specifically excluded in the legislative history, nor are the continuing costs (on a proportionate basis) of the uplink facility used to provide the channel and a proportional share of the telemetry, tracking and control costs for the space station. In addition, certain overhead or personnel costs that are directly related to making the channel available to nonprofit groups could be considered 'direct costs'. For example, if a DBS provider has an authorization center of procedure used solely for the provision of noncommercial channels, such costs may be contemplated as allocable to noncommercial programmers." All of the above costs which the Commission would define as a "direct cost" clearly falls under the definition of overhead, i.e., the general cost of running the DBS business, as opposed to the specific cost to

Definition of Educational Programming

The Commission, noting in the NPRM that Congress has failed

is not educational programming. By and large, PBS's noncommercial programming is shown on noncommercial broadcast stations for the entertainment of the home viewer. Just because programming has the imprimatur of PBS does not mean that it is educational programming. *All* programming shown on television, whether commercial or noncommercial, is educational in a

of channel usage for all eligible parties concerned. Permitting the use of a percentage of cumulative time would create more administrative ambiguity while imposing further barriers to noncommercial users. For instance, how would the term "cumulative time" be defined, and by whom. How would the noncommercial user be able to confirm the DBS providers' calculation of the proper percentage of "cumulative time" available to the noncommercial user. Is the channel mapping technology used in wireless cable systems, which presumably would be the technological model contemplated here, even available to DBS operators at the present time?

Allocation System

The entire set-aside program begs the basic question, which the FCC has failed to address in the NPRM: how will the set-aside channels be allocated among those entities who are qualified to use the channels. There must be some type of allocation system established for the orderly distribution of the set-aside channels. Otherwise, the whole set-aside concept will fail to meet its goals of providing educational programming to the public.

Furthermore, FCC control of this process is necessary. The DBS operators may not be allowed to pick and choose who they wish to deal with from among those entities indicating their desire to use, and pay for, the set-aside channels. Otherwise, the behemoths of the noncommercial world, like the Corporation

for Public Broadcasting and PBS, and perhaps even the religious programmers, will use their political and economic clout to grab up all the channels, leaving nothing for the smaller, independent noncommercial entities like HITN.

The allocation system should work as follows. Once a DBS system is launched, the FCC should open a window during which a national educational programming supplier indicates its interest in using one of the set aside channels. First, the FCC determines exactly how many channels are available. Then, once the window closes, the FCC determines how many eligible entities have indicated interest in using the channels. If there are fewer entities than channels, then the FCC can allocate a channel to each entity, leaving the remaining channels available on a first-come, first served basis. If there are more entities than channels, the FCC should hold a lottery pursuant to Section 309 of the Communications Act in order to allocate the channels among the interested entities.[6] The Commission should institute a minority preference in the channel lottery for minority-owned parties seeking to participate in the DBS service.

The Commission should also institute multiple ownership prohibitions, similar in principal to those applied in the broadcasting service. The restrictions should take two forms:

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[6] The Commission should reject any suggestion of a comparative evaluation of the eligible applicants. Such an evaluation would once again no doubt be slanted heavily toward the industry giants like PBS, leaving smaller entities like HITN without a DBS channel after the comparative process has been completed.

first, entities who are already providing their programming directly to the home through a DBS provider under Part 25 or Part 100, either through the set-aside or not, may not be permitted to lease another channel through the set-aside program until all interested parties without channels have had access to a channel first. Second, the Commission should also establish an overall *maximum* percentage of channels that each entity will be allowed to use, as the service matures and more DBS providers launch a service in the future. HITN urges that no entity, or

WHEREFORE, the foregoing premises considered, HITN respectfully requests that Commission incorporate the comments of HITN into the regulations formulated to govern the use of the channels set aside for use by national educational programming suppliers in the DBS service.

Respectfully Submitted,

HISPANIC INFORMATION AND
TELECOMMUNICATIONS NETWORK, INC.

By: Benjamin Perez

Benjamin Perez, Esq.
Its Counsel
1801 Columbia Rd. NW
Suite 101
Washington DC 20009
(202) 462-3680

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